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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 562

RUTHERFORD FOOD CORPORATION AND THE GEORGE KAISER PACKING COMPANY, PETITIONERS,

VS.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

E. R. MORRISON,
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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Rutherford Food Corporation and The George Kaiser Packing Company pray that a writ of certiorari be issued to review the decree of the Circuit

Court of Appeals for the Tenth Circuit entered in Cause No. 3213 on the docket of the said Circuit Court of Appeals in the May Term, 1946 (R. 185).

HISTORY OF THE CASE.

This suit was brought in the United States Court for the District of Kansas, First Division by Respondent under Section 17, 29 U. S. C., Sec. 201, to restrain petitioners from violating Sections 7, 11(c), 15(a)(1), 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act.

The facts are undisputed and are covered by a written stipulation supplemented by depositions taken by the Respondent. Judgment was entered in the District Court on May 21, 1945, dismissing the action (R. 171). The trial judge filed a written opinion (R. 150) and made findings of fact and conclusions of law (R. 163).

Upon appeal to the United States Circuit Court of Appeals for the Tenth Circuit, judgment was entered July 18, 1946, reversing and remanding the cause (R. 185).

The majority opinion is by Circuit Judge Bratton and was concurred in by Circuit Judge Huxman (R. 175). Circuit Judge Phillips filed an opinion concurring in the result but dissenting as to the main issue concerning the status of the boners (R. 182).

Petitioners filed a motion for rehearing (R. 189) which was overruled August 26, 1946, by a majority of the court, Circuit Judge Phillips dissenting (R. 203).

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. A., Sec. 347(a), 8 F. C. A., Title 28, Sec. 347(a).

STATUTE INVOLVED.

The case presents the proper construction of Sections 3(d), 3(e), 3(g) and 7(a) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, Ch. 676, 52 Stat. 1060; U. S. C., Title 29, Sec. 201, *et seq.*, 29 U. S. C. A., Sec. 201, *et seq.*).

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The George Kaiser Packing Company is the owner of a small meat packing plant in Kansas City, Kansas (R. 11). Rutherford Food Corporation is its chief customer for boned meat (R. 16) and actually operated the plant under a lease for a period of ten months (R. 13). The issues as to both petitioners are identical and for convenience the term "Kaiser" or "plant operator" will be used herein as referring to both.

Kaiser began the production of boned beef for army contracts in October, 1942 (R. 16). At that time he had had no experience in this type of production and he made inquiries with respect to the matter which came to the attention of an experienced boner named Reed (R. 16). Boners were in great demand (R. 104). Reed proposed to Kaiser that he would undertake to assemble a crew of boners and would enter into a contract to do the boning on the basis of a certain price per hundredweight (R. 17, R. 95-7). This method of production is not uncommon in the packing industry (R. 169, 21) and Reed had worked in two plants in St. Louis under similar arrangements (R. 17).

A written contract was entered into under which Reed agreed with Kaiser to bone all carcasses that he required for government contracts on the basis of 40¢ per hundred pounds (R. 17, 32). The boners were to be employed and

paid by Reed, who assumed full responsibility for them and they were to be subject solely to his direction and control. Reed was to furnish his own tools and equipment. Kaiser was to provide tables and a room in the Kaiser plant referred to as the "vestibule" in which the work was to be performed (R. 33-34). Reed was to carry his own Workmen's Compensation and Liability Insurance (R. 34). The work was carried on by Reed and successive contractors under substantially the same terms from October 14, 1942, until the time of trial in January, 1945 (R. 17). The boning was agreed to be done (R. 33) and actually was done under the constant supervision of army inspectors (R. 31).

Kaiser never at any time exercised any direction or control over who should work as boners or engaged the services of any boner and never paid the wages of any boner or made any agreement with them in respect to their compensation (R. 23). He had no control over their hours, the division of the work or the amount or form of their compensation (R. 23). Some of the boners were at times paid by the contractor on an hourly basis at rates of $1.25 to $1.50 per hour (R. 22). The predominant method of payment employed by the contractors and the boners was to share equally any division of the boning money on the basis of hours worked (R. 22), on which basis the amount earned would be about $1.57 to $1.80 per hour (R. 167, 21, 22). This was an equitable method of division (R. 168), because some of the men boned fleshy portions of the carcasses and others boned the more thinly fleshed parts (R. 22). Some weeks the boners worked more than 40 hours, but this was a matter entirely under their control as they determined both the hours of work (R. 23, 65, 67), and also the number of carcasses that they would bone on a particular day (R. 66).

There was nothing in the contract that controlled the manner in which the contractor should pay the boners employed by him, nor was there anything to prevent the payment of overtime (R. 32, 22). In the earlier periods the boners working on an hourly basis were not paid overtime, but at the time of trial and for some months prior thereto, all hourly boners were paid overtime by the contractor (R. 22).

The trial judge found that the contracts raised no inference of an intent to impose substandard working conditions (R. 168), and that the agreements were not sham or deceptive, but were necessitated by the exigencies of the situation that confronted Kaiser in October, 1942 (R. 168). These findings are not controverted by the opinion in the Court of Appeals.

Opinion in the District Court.

In its opinion, the trial court held that there was nothing in the boning contract that was contrary to the purposes of the Act, and that in fact it would be difficult to conceive of a method of doing business that would do more to promote the principles of the Act (R. 158). It was held that the boning was done by independent contractors and that the relation of employer and employee did not exist between the Kaiser Company and the boners. The court cited with approval *Bowman* v. *Pace Company*, 119 F. 2d 858 (C. C. A. 5, 1941) to the effect that it was not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists to measure it by the standards fixed by the law.

Opinion of the Court of Appeals.

In the majority opinion of the Court of Appeals it was held that the boners were employees of Kaiser because the work was being done on his premises, along-

side admitted employees and contributed to the common objective of the plant production. The opinion likened the operation to the conventional factory assembly line. The majority opinion gave no consideration to the fact that there was no contractual relationship existing between Kaiser and the boners, and ignored the decision in *Bowman v. Pace Company* and the numerous cases which follow it. Judge Phillips was of the opinion that the findings and inferences therefrom by the trial court as to the status of the boners should be accepted (R. 182-185).

QUESTIONS PRESENTED.

1. Whether it is (a) the purpose of the Fair Labor Standards Act to create a liability for the payment of wages to persons as to whom no wage liability would otherwise exist or (b) to measure the extent of an existing wage liability which has been created by agreement express or implied?

2. Does the phrase "suffer or permit to work" as used in the Act bring within its scope persons with whom there is no contractual obligation to pay wages either express or implied?

3. Do the purposes of the Act bring employees of an independent contractor into an employer-employee relationship with a plant operator because the contract requires the work to be performed in the plant, in intimate association with the plant operator's employees, and as a contribution to the common object of production, there being no intent to evade the Act?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

Importance of the Questions Presented, Which Have Not Been, But Should Be, Determined by This Court.

No other act pertaining to employer-employee relationships contains the phrase embodied in Section 3(g) of the Act, that "'Employ' includes to suffer or permit to work." Obviously this phrase is intended to have a special meaning. On this the decisions are agreed. As to the exact meaning, there are differences of opinion, though all (except the Tenth Circuit in this case) appear to agree that it is not the purpose of the Act to include all of those whose work is performed for the ultimate benefit of the alleged employer, where there is no agreement to pay compensation express or implied.

Petitioners contend that the language "suffer or permit to work" should be interpreted to mean work done under a contract of employment, or under circumstances that create an obligation to pay wages; they contend that the existence of a liability to pay wages is fundamental and that it cannot be created by questions as to control of the details of the work or as to whether the work is done under a common roof with the admitted employees. The reported cases show that this question has often arisen in lower courts, but it has never been decided by this Court.

It is a question of great importance and this Court should determine the correct interpretation of this phrase.

Equally important is the question presented in this case and never decided by this Court as to whether it is the

purpose of the Act to measure existing wage liabilities or to create new wage liabilities.

The frequency with which this question has arisen, under facts similar to those in the case at bar, shows the necessity for its early determination by this Court. The question is squarely presented for determination here because,

(a) This precise principle was stated and quoted with approval in the opinion by the District Judge, which opinion, and the judgment based thereon, is reversed by the opinion of the Tenth Circuit Court of Appeals;

(b) The majority opinion in the Court of Appeals bases its conclusion that the boners were employees of the plant operator upon facts and circumstances other than the existence of an obligation to pay wages; and

(c) Failure to apply this rule was again called to the attention of the Circuit Court of Appeals in the motion for rehearing (R. 194), which motion was overruled by a majority of the Court, Circuit Judge Phillips dissenting (R. 203).

Reference in the majority opinion to the "conventional assembly line" presents in vivid form the erroneous conception inherent in the majority opinion. The controlling factor, as the majority of the Court saw it, was not the contractual relationship but the physical relationship, which is exemplified by the Court's reference to the work being done under one roof and alongside admitted employees. If the "assembly line" test is valid then every factory owner should know it. If it is not the law, then the uncertainty created by the conflict with numerous other decisions should be promptly dispelled.

The questions involved were not determined by this Court in the decision of this Court in *National Labor*

Relations Board v. Hearst Publications, 322 U. S. 111, because, (1) there was a direct contractual relation between the newsboys and Hearst, (2), this Court was called upon to define the relation, not to create a contractual relation, and (3) in this case, there is no contractual relation between Kaiser and the boners.

II.

The Opinion Is in Direct Conflict with Decisions of Four Other Circuit Courts of Appeals.

There is direct conflict with the following cases.

(1) *Bowman* v. *Pace Company*, 119 F. 2d 858 (C. C. A. 5th, 1941).

The Pace Company made a contract with Forsyth to furnish a watchman at their wholesale grocery plant. The old watchman was continued in service for awhile and subsequently Bowman was employed. Besides the duties of watchman, he gave drivers of departing trucks bills of goods to be carried and received from the incoming trucks bills to be turned into the office; he delivered pay envelopes and also took charge of money brought in by the drivers; kept up with the lubrication of the trucks and arranged for lubrication. Thus, his duties were part of the essential, normal every day work of the company and an integral part of its operations. The court in its opinion by Sibley, C. J., said:

> "The strongly contested issue is whether he was the employee of the Pace Company at all. If not, he cannot recover of that Company. It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly nor

suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act. If the Pace Company, in order to evade the Act, colluded with Forsyth to interpose him as an apparent independent contractor, we would hold him the agent of the Pace Company to hire and pay the watchman, so that Bowman would be the employee of the Pace Company. While that is alleged here, the proof wholly fails to sustain it, * * *"

* * * * * * *

"But it is argued that Bowman was so far under the orders of the Pace Company as that Forsyth was not an independent contractor, * * * If one has full direction over the conduct of his business done by another, it is just to hold him responsible to any person who has been injured by a misconduct of the business; but it does not follow at all that the liability for wages is thereby shifted. Wages are due according to principles of contract, not of tort. See 2 Labatt, Master and Servant, 2d Ed., Secs. 665, 680."

(2) *Walling* v. *Sanders*, 136 F. 2d 78 (C. C. A. 6th, 1943).

Defendant was a wholesale beer dealer who employed salesmen to each of whom was furnished a delivery truck owned by the wholesaler. These salesmen employed and paid drivers to go with them on the trucks to help them drive, deliver beer and pick up empty cases. The Administrator sought to hold the dealer liable for the payment of overtime to the drivers. The Court said in the opinion by Circuit Judge Simons:

"The usual test by which, in common experience, men determine the employer, is to ascertain who has authority on his own account to 'hire and fire.' But the administrator urges that the term 'employee' as here used is not a word of art but one carefully

defined by the statute. He refers to Section 3(e) of the Act which defines 'employee' as any individual employed by an employer, and Section 3(g) which defines 'employ' to mean 'to suffer or permit to work.' Since the appellee suffers or permits drivers to work for its salesmen, *ipso facto* they work for it. This likewise does not follow. In so broadly defining the word 'employ' Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment. The administrator desires us to construe employees so as to include not only those who work for an accused employer, but also those who work for anybody else. Manifestly this would encompass all employed humanity."

(3) *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616 (C. C. A. 8th, 1942):

It was contended that one Marvin Johnson was an employee of the Ferry Company because he performed the service for the Ferry Company of hauling loads of coal each day to the landing stage; also that he repaired part of the road leading to the ferry and kept it in such condition as to enable passengers and freight to reach the ferry landing on one side of the river; also, he occasionally hauled a load of brick to be used for the same purpose. He was not paid by the Ferry Company for this work, but was employed and paid by the week by the General Manager of the Ferry Company who operated a cotton plantation near the river. The Court in the opinion by Circuit Judge Riddick, said:

"* * * The Act defines an employee as 'any individual employed by an employer,' and the word 'employ' as used in the Act includes 'to suffer or permit to work.' But since the obvious purpose of the Act is to establish minimum wages and maximum hours, the words last quoted can not be interpreted to include as an employee one over whose hours of labor the

employer has no control, and to whom the employer is under no obligation to pay wages."

The court quoted *Bowman* v. *Pace Company, supra,* with approval (l. c. 620).

(4) *Reconstruction Finance Corp.* v. *Merryfield,* 134 F. 2d 988 (C. C. A. 1st, 1943).

A judgment against the RFC for overtime compensation to alleged employees was reversed. The question involved was whether the Shoe Corporation or the RFC were in control of the premises where appellees were employed as watchmen, firemen and maintenance men. Various facts were shown which were claimed to indicate that RFC employed appellees. Among other facts the checks for their wages were signed by RFC. However, Circuit Judge Mahoney in his opinion said that:

> "The testimony * * * is clear that in the matter of hiring and discharging employees, directing them in their work and fixing their wages, the Shoe Corporation, through its officers, was in complete control and did not consult with nor receive advice from RFC. * * *
>
> "* * * In *Bowman* v. *Pace Co.*, 5 Cir., 1941, 119 F. 2d 858, 860, the question was raised whether the corporation whose premises were watched by a night watchman suffered or permitted him to work for it. The court determined 'if one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act.'"

(5) *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C. C. A. 6th, 1943).

In this case the Court held that certain home workers receiving substandard compensation for their work were

employees within the meaning of the Fair Labor Standards Act. It was contended that there was no supervisory control over home workers but it was conceded that their services were engaged by defendant and the compensation paid directly to the workers without any intervening contractor. In the opinion by Circuit Judge Simons, the decisions of *Bowman v. Pace, supra*, and *Walling* v. *Sanders, supra*, are quoted and approved. The Court says:

> "Much has been written concerning the meaning of subsection (g). It was said by the court of the Fifth Circuit in *Bowman* v. *Pace Company*, 119 F. 2d 858, 860, so greatly relied upon by the appellee: 'It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law.' This statement of principle is, however, illuminated by the illustration which immediately follows: 'If one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act.' There would seem to follow from this negation, an affirmation that if one does suffer or permit another to work under circumstances where an obligation to pay him will be implied, they are employer and employee under the Act. The problem in the Pace case was not to determine whether a master-servant relationship existed at all, but whether it existed between the employer and the industry sought to be regulated as an employer. If such relationship existed between the employee and an intermediate independent contractor, the defendant was not accountable for violation of law."

The foregoing decisions have been followed in numerous cases by the district courts, of which we cite the following: *Maddox* v. *Jones*, 42 F. Supp. 35 (D. C., Ala., 1941); *Lorenzetti* v. *American Trust Co.*, 45 F. Supp. 128

(D. C., Calif., 1942); *Dugas* v. *Nashua Mfg. Co.*, 62 F. Supp. 846 (D. C., N. H., 1945) and *David* v. *Boylan's Private Police*, 34 F. Supp. 555 (D. C., La., 1940).

The opinion of the Court of Appeals in this case does not point out in what manner the purposes of the Act would be served by the decision. It lays down no principle or rule by which liability could be determined. It follows no definite pattern, and if it is to be approved it will introduce uncertainty of interpretation that will be utterly impractical in the administration of the Act.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued, directed to the said United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and send to this Court for its determination, a full and complete transcript of the record and proceedings in the cause numbered and entitled on the docket of said Circuit Court of Appeals as No. 3213, *L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor,* v. *Rutherford Food Corporation and the George Kaiser Packing Company*, to the end that the decision of such District Court may be reviewed and determined by this Court and the decree thereof be reversed by this Honorable Court.

E. R. MORRISON,
HOMER H. BERGER,
Attorneys for Petitioners.

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Of Counsel.

APPENDIX

Pertinent Sections of the Fair Labor Standards Act of 1938

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

Finding and Declaration of Policy

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free

flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Definitions

Sec. 3. As used in this Act—

* * * * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * * * * *

Maximum Hours

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * * * * *

Prohibited Acts

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such pro-

ceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

Penalties

Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly

situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The count in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Injunction Proceedings

Sec. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

* * * * * * * *